2000

Due Process and Fundamental Rights

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DUE PROCESS AND FUNDAMENTAL RIGHTS

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Substantive due process has always been a very contentious doctrine in the history of constitutional law. The first case that dealt with substantive due process was the *Dred Scott*[2] case, in which the Supreme Court said that slave owners had a substantive due process right to possess slaves. Then, after *Dred Scott*, the Supreme Court, during the discredited *Lochner*[3] era, created economic substantive due process rights.

In more recent years, the Supreme Court has consistently expressed its reluctance to expand the doctrine of substantive due process, claiming that it poses a threat to the legitimacy of the Court's decision-making processes. In essence, the Court recognized that the text of the Constitution does not support substantive due process. This lack of textual support exposes the Court to accusations that application of the doctrine furthers the

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[2] *See* Dred Scott v. Sanford, 60 U.S. 393 (1856).

[3] *See* Lochner v. New York, 198 U.S. 45 (1905). From 1905 to 1937, the "Lochner era", the Supreme Court articulated three major principles: (1) freedom of contract is a basic liberty and property right protected by the Due Process Clause of the 14th Amendment; (2) the government could interfere with the freedom of contact only when necessary to protect the public; and (3) it was up to the courts to scrutinize any legislation that interfered with an individual's right to work, to contract, or engage in business activities, in order to determine whether it served a legitimate public interest. *See id.*

justices' own value pretences, rather than interpreting the Constitution. Nevertheless, the Court relied upon substantive due process to sustain two claims by individuals last term. In the first case, *Troxel v. Granville*,[4] the grandparent visitation case, the Supreme Court invoked the substantive due process rights of natural parents to raise their children.[5] The Court held that due process encompasses the right of parents, under normal circumstances, to reject unwanted visitors.[6] *Troxel* contained no majority opinion, with the justices writing six separate opinions.

In the second substantive due process case, *Stenberg v. Carhart*,[7] the Supreme Court invoked the substantive due process right of pregnant women to decide to have an abortion in striking down a Nebraska ban on so-called partial birth abortions.[8] The Court held that the Nebraska ban placed an undue burden on a

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[4] 120 S. Ct. 2054 (2000). The case involved an unmarried couple, Tommie Granville and Brad Troxel, who had two daughters together and later separated. After the separation Brad Troxel moved in with his parents and during the course of his stay he frequently brought his daughters by for extended visits. Two years after his separation from Granville, Brad Troxel committed suicide. Although Brad's parents, the Troxels, continued to enjoy frequent visits with their granddaughters after Brad's death, the children's mother later wished to reduced visitation to once a month. The Troxels then brought an action, under Washington State law, for visitation. Tommie Granvill defended by invoking her constitutional right to raise her child. *See id.* at 2057-59.

[5] *Troxel*, 120 S. Ct. at 2060. The Court found that the 14th Amendment's Due Process Clause includes a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Id.* (quoting Washington v. Glucksberg, 521 U.S. 702, at 720).

[6] *Id.* at 2061 (indicating that so long as a parent is fit and adequately cares for his or her children, the state has no reason to interfere with the family or to question the parent's ability to make decisions concerning the children). In this case in particular, the U.S. Supreme Court found that a grant of visitation in favor of the grandparents violated Granville's "due process right to make decisions concerning the custody and control of her daughters." *Id.* at 2065.

[7] 120 S. Ct. 2597 (2000).

[8] *Id.* at 2600-01. The challenged statute was Neb. Rev. Stat. §28-328 (Supp. 1999), which in effect criminalized the performance of "partial birth abortion." It defined "partial birth abortion" as a procedure in which the doctor "partially delivers vaginally a living unborn child before killing . . . the child." *Id.*; *See* Neb. Rev. Stat. §§ 28-328.

woman's right to choose to have an abortion.[9] Although *Stenberg* was a five-to-four decision, it produced seven separate opinions.

Last term, the Supreme Court decided only 73 cases by full opinion. Some have referred to this as the United States Supreme Court's "incredibly shrinking docket." *Troxel* and *Stenberg* represent two cases, in which the justices wrote thirteen opinions. I think this evidences the contentious nature of substantive due process.

Let me start with *Troxel*. *Troxel* dealt with a Washington State statute that permitted "any person to petition" a court for visitation, and authorized granting of visitation rights when visitation serves the best interest of the child.[10] Justice O'Connor, who wrote a plurality opinion for herself and three others justices, described the statute as breathtakingly broad,[11] showing that different people may have different perceptions of what is breathtaking. Despite Justice O'Connor's characterization of the Washington State statute, *Troxel* contained no majority opinion. The four justice plurality held only that the statute violated substantive due process as applied to the particular facts in the case.[12] Justices Souter and Thomas, who wrote separate

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[9] *Id.* at 2602. "The Nebraska statute imposes an 'undue burden' on a woman's ability to choose an abortion." *Id.* The phrase "undue burden" exists when a state regulation has the purpose or effect of creating a considerable obstacle for women seeking an abortion of a non-viable fetus. *Id.* at 2604.

[10] *Troxel*, 120 S. Ct. at 2060-61; *See also*, Washington Rev. Code §26.10.160(3), which permits "any person to petition for visitation rights at anytime and authorizes state superior courts to grant such rights whenever the visitation may serve a child's best interest." *Id.*

[11] *Troxel*, 120 S. Ct. at 2060-61:

> [The statute] as applied to Granville and her family in this case, unconstitutionally infringes on that fundamental parental right. The Washington non-parental visitation statute is breathtakingly broad. . . . Once the visitation petition has been filed in court and the matter is placed before a judge, a parent's decision that visitation would not be in the child's best interest is accorded no deference. . . . Instead, the Washington statute places the best-interest determination solely in the hands of the judge.

Id.

[12] *See id.* at 2063-64 (stating that the Due Process Clause encompasses the fundamental right of parents to make childrearing decisions, and the state cannot

concurrences, would have affirmed the Washington Supreme Court decision, which held the statute unconstitutional on its face.[13] Three Justices, Stevens, Scalia and Kennedy, would not have found any substantive due process violation at all.[14] Stevens and Scalia agreeing? You see . . . substantive due process can make strange bedfellows.

In her plurality opinion, Justice O'Connor recognized that the constitutionally protected right of natural parents to raise their children is perhaps the oldest fundamental liberty interest recognized by the Court.[15] In support, she cited Supreme Court cases going back over seventy-five years, such as *Meyer v. Nebraska*[16] and *Pierce v. The Society of Sisters*.[17] However, if the constitutionally protected right of the natural parent to raise his or her child is so well established, why didn't *Troxel* contain a solid majority opinion? Why such a diversity of views among the justices? Why the failure to articulate a standard of judicial review? Although compelling interest review is normally applied when the Supreme Court recognizes a fundamental constitutionally protected right, it is not always applied. Sometimes the Court applies a substantial or important governmental interest test.[18] So, why doesn't *Troxel* articulate a standard of judicial review? Well, I think the failure to articulate a definitive standard of review

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infringe this right "simply because a state judge believes a 'better' decision could be made," without giving any weight to the fitness of the parent).

[13] *Id.* at 2066-68. (Souter, J., Thomas, J., concurring).

[14] *Id.* at 2068-79. (Stevens, J., Scalia, J., Kennedy, J., dissenting).

[15] *Id.* at 2060. "The liberty interest at issue in this case--the interest of parents in the care, custody, and control of their children--is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Id.*

[16] 262 U.S. 390 (1923) (striking down a Nebraska statute forbidding anyone from teaching students in any language other than English as an unconstitutional interference with a student's opportunity to acquire knowledge and a parent's right to control the education of his or her children.)

[17] Pierce v. The Society of Sisters, 45 S. Ct. 571 (1925) (striking down a statute requiring children to attend public school and therefore preventing parents from enrolling their children in parochial school). The Court held in *Pierce* that the Fourteenth Amendment encompasses the right of parents to control the upbringing and education of their children. In doing so, the Court denied the states the power to "standardize its children" by forcing them to accept only public education. *See id.*

[18] *See* Moore v. City of East Cleveland, 431 U.S. 494 (1977); Zablocki v. Redhail, 434 U.S. 374 (1978).

shows that the Court is very cautious in this area. As a result, the Court appears reluctant to dive into this area of child visitation head-on. From one perspective, I believe the cautious approach is understandable, since a tension was created when the Supreme Court recognized a fundamental constitutionally protected right in the area of family law--an area of strong state interest. But, while it may be understandable that the Court might want to proceed cautiously, I wonder if the caution is a little overdone. After all, this right has existed for seventy-five years, a long time for the Court to resolve the standard of judicial review. More importantly, it seems that, under *Troxel*, child visitation cases, which have been normally dominated by state law, may now have constitutional dimensions to them as well. If this interpretation is correct, it would seem that the Court owes a duty to lower courts and those attorneys who litigate these issues to articulate the standard of judicial review.

In fairness, however, the plurality did lay out some guidelines. The plurality stated that, at least in the normal course of events, the constitutional right of the natural and fit parents requires family courts to administer state visitation statutes in a way that gives special weight to the natural parent's position.[19] This requirement creates a presumption that the natural parent's position is correct. But, the presumption hardly qualifies as a definitive standard of judicial review. If awards were given for last term's Supreme Court decisions, this case would win the award for the case in which the most was written but the least was decided.

Let me move on to the second substantive due process case, the partial birth abortion case, *Stenberg v. Carhart*.[20] I have to confess, I have exceedingly little knowledge or expertise on the physiological aspects of abortion, and before this case was decided I had never heard of the specific types of partial birth abortions. It seems more prudent, therefore, that I concentrate on the constitutional and not the physiological aspects of the case.

In 1973, in *Roe v. Wade*, the Supreme Court characterized a woman's decision to have an abortion as a fundamental

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[19] 120 S. Ct. 2054, 2062 (2000) (stating that when the parents' decision regarding who may visit their child becomes subject to judicial review, the reviewing court must give deference to the parents' initial decision).

[20] 120 S. Ct. 2597 (2000).

constitutionally protected right encompassed within the constitutionally protected right of privacy.[21] With this characterization came the highest level of judicial scrutiny; the *Roe* Court held that pre-viability abortion regulations would be upheld only if the state could demonstrate a compelling state interest.[22]

The Court's 1992 decision in *Planned Parenthood v. Casey*[23] suggested a significant shift in approach. The majority of the Court no longer spoke in terms of a pregnant woman's fundamental constitutionally protected right to choose to have an abortion. Instead, a pregnant woman has a liberty interest in choosing to have an abortion.[24] The distinction is a critical one, because, under *Planned Parenthood*, the new standard of review became the undue burden test.[25] The question now was whether a state regulation places an undue burden on a woman's decision to have an abortion. The governing principle is that state regulations that impose undue burdens on the woman's pre-viability abortion decision are unconstitutional.[26]

The new standard produced new questions. For example, what is meant by "undue burden"? In *Planned Parenthood*, the Supreme Court provided a definition. The Court stated that an undue burden may be created by a state law that has the purpose or

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[21] 410 U.S. 113 (1973). The Court stated that "[the] right of privacy, whether it be founded in the Fourteenth Amendment's conception of personal liberty and restrictions upon a state action . . . or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy". *Id.* at 153.

[22] *Roe,* 410 U.S. at 155. The Court noted that, "where fundamental rights are involved, . . . regulation limiting these rights may be justified only by a compelling state interest and . . . legislative enactments must be narrowly drawn to express only legitimate state interests at stake." *Id.*

[23] 505 U.S. 833 (1992) (stating that stare decisis requires reaffirmance of the Court's essential holding in *Roe v. Wade* that a woman has a constitutional right to choose an abortion prior to viability of the fetus, but shifting the test to be used in evaluating abortion restrictions from the trimester framework of *Roe* to the undue burden test).

[24] *Id.* at 876-77.

[25] *Id.* at 833. Government regulation of abortions, prior to viability, should be allowed, unless the regulation places an "undue burden" in the path of a woman seeking an abortion. *Id.*

[26] *Id.* at 876. The joint opinion in *Planned Parenthood* explained that "the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty." *Id.*

effect of placing a substantial obstacle in the path of a woman considering an abortion.[27] In my opinion, the Court's definition is unhelpful. After all, the Supreme Court could have called the test the "substantial obstacle test", and defined substantial obstacle as a state law that has the purpose or effect of placing an undue burden in the path of a woman seeking an abortion. The problem is that the undue burden standard doesn't give very much guidance as to what the Court had in mind. Does the test contemplate careful federal judicial scrutiny of state abortion policies, or does it contemplate federal courts giving great deference to state abortion policies? Maybe the test fits between these two extremes? To me, this is the biggest question of all. Although *Planned Parenthood* did not answer the question specifically, four of the five Pennsylvania statutory provisions before the Supreme Court were held constitutional.[28] This fact is a clear indication that the "undue burden" test contemplates federal courts giving much more deference to legislative judgement than under the *Roe v. Wade* compelling state interest test.

The majority decision in *Stenberg* also failed to spell out what the "undue burden" test implies in terms of the degree of judicial scrutiny. However, two indicators from the five Justice majority indicated that it is not a test of substantial deference to legislative judgment.[29] For one thing, the Court referred to the woman's abortion decision as being a fundamental liberty interest.

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[27] *Id.* (holding that an "undue burden" exists when a state regulation has the purpose or effect of placing a considerable obstacle in the path of a woman seeking to abort her non-viable fetus).

[28] *Planned Parenthood,* 505 U.S. at 893. The five Pennsylvania statutory provisions require the following: 1) that a woman seeking an abortion give her informed consent prior to the procedure, 2) that she be provided with certain information at least twenty-four hours prior to the abortion so that she may give that informed consent, 3) that a minor obtain parental consent to have an abortion, or if she cannot or does not wish to seek parental consent, she can seek permission from the court, 4) that a married woman seeking an abortion must sign a statement indicating she has informed her husband of her intent to have an abortion, and 5) recordkeeping requirements. There was an emergency exception to the first four requirements. The Court upheld all of the provisions except for the requirement that a married woman inform her husband of her intent to seek an abortion. The Court found that this requirement placed an undue burden on the woman's right to choose. *See id.*

[29] *See Stenberg,* 120 S. Ct. at 2615.

Roe v. Wade held that this interest is a fundamental constitutionally protected right, while *Planned Parenthood* stated it is a liberty interest, which now, under *Stenberg*, has become a fundamental liberty interest.[30] The Court's decision in *Washington v. Glucksberg*,[31] a case dealing with physician assisted suicide, indicates that the modifier fundamental liberty interest is significant.[32] *Glucksberg* draws a distinction between liberty interests that receive a low level of judicial scrutiny and "fundamental" liberty interests that receive more serious judicial scrutiny.

The second indicator in *Stenberg* that great deference should not be given to the legislative judgment is found in the Court's analysis of whether Nebraska's ban on partial birth abortions constitutes an "undue burden" on a woman's abortion decision. Significantly, the majority evaluated the available medical evidence itself, as opposed to deferring to the evaluation made by the Nebraska State legislature.[33] This indicates that the Court did not view the undue burden test as a test involving substantial deference to the legislative judgment.

Based on its evaluation of the medical evidence, the Court found two instances where the Nebraska statute placed an undue burden on pregnant women seeking abortion. First, in some cases partial birth abortions may be necessary to save the life of the pregnant woman,[34] and second, in some cases partial birth abortion could be the safest procedure for a particular woman.[35]

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[30] *Roe*, 410 U.S. at 152; *Planned Parenthood*, 505 U.S. at 915.

[31] 521 U.S. 702 (1997).

[32] *Id.* at 720-21. The Due Process Clause specifically protects all rights and liberties that qualify as "fundamental." Fundamental rights are those rights that are "objectively rooted in the nation's history, and so implicit in the concept of ordered liberty, such that neither liberty nor justice could exist if [these fundamental liberty interests] were sacrificed." *Id.*

[33] *Stenberg*, 120 S. Ct. at 2613.

[34] *Id.* A statute that altogether forbids a particular method of abortion must contain a health exception permitting an abortion if its denial could endanger the health and welfare of the woman. *Id.*

[35] *Stenberg*, 120 S. Ct. at 2613. The division of expert medical opinion concerning the issue of partial birth abortion safety reflects uncertainty in the field, which may indicate a significant likelihood that partial birth abortion could be safer under certain circumstances. *Id.*

Although *Stenberg* was a victory for abortion rights advocates, the joy was short lived. This is because Justice Kennedy, who voted with the plurality in *Planned Parenthood*, sided with the dissent in *Stenberg*. In particular, Justice Kennedy was of the view that the Court should have deferred to the judgment of the Nebraska legislature, which was quite a different view from that of his colleagues in the majority.[36] In his *Hill v. Colorado*[37] dissenting opinion, Justice Kennedy indicated a sense of betrayal. He believed five of his colleagues violated a promise made in *Planned Parenthood*, that there would be a careful balancing between the interest of pregnant women seeking abortion and the interests of the state.[38] Pro-abortion rights advocates are probably very worried about the loss of Justice Kennedy's support.

In the event a litigant can't succeed on a substantive due process claim, the next natural place to turn is equal protection. Decided last term by the Supreme Court, *Village of Willowbrook v. Olech*[39] is of particular importance to anyone who litigates constitutional claims against municipal government.

There seems to be a proliferation, especially in New York, of cases referred to as a "class of one" equal protection claims; these are claims involving selective enforcement of the civil law. In essence, the plaintiff complains he was singled out as an individual and treated differently than others who were similarly situated.[40] Lower federal courts have been quite unreceptive to these types of claims, and I think that there are two main reasons for this. First of all, I think the claim sounds like whining to a

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[36] *Id.* at 2629. (Kennedy, J., dissenting). Justice Kennedy believed that Nebraska was entitled to conclude that its ban neither deprived women of the right to a safe abortion nor imposed a substantial obstacle on the rights of any woman seeking an abortion. *Id.* Additionally, Justice Kennedy believed that by deferring to the physician's judgement, the majority turned its back to cases decided after *Roe v. Wade* giving a physician the ability to control a patient's treatment. *Id.*

[37] 120 S. Ct. 2480, 2516 (2000) (Kennedy, J., dissenting). The majority in *Hill* upheld restrictions on abortion protestors.

[38] *Id* at 2529-30 (Court in a "cruel way" turned its back on "careful balance" reached by joint opinion in *Planned Parenthood*).

[39] 528 U.S. 1073 (2000).

[40] *Id.* at 1074.

federal court judge – this is the type of thing you complain about in the fifth grade, or maybe in college or law school – "you gave him a B, how is it you gave me a C plus?" Federal judges may feel that the plaintiff ought to grow up. More importantly, however, I think that federal judges are legitimately concerned about the ramifications of granting relief to this plaintiff. Subsequent plaintiffs will want to join the show; the plaintiff's brother, sister, father-in-law, and uncle will all want to join the show, and they are all going to have similar types of equal protection claims. I believe this is the real concern of the federal courts.

Last term, in *Village of Willowbrook v. Olech*, the plaintiffs, a husband and wife, who owned property, submitted an application to the village asking permission to hook up their house to the village's water supply.[41] The village agreed, with one condition. To get the hookup, the Olechs had to give the village a thirty-three foot easement.[42] The Olechs protested, noting that their neighbors who were hooked-up to the same water supply only had to give a fifteen foot easement.[43] The Olechs filed a federal complaint alleging disparate treatment.[44] They claimed that ill-willed village officials singled them out in an arbitrary and irrational way.[45] In essence, the Olechs alleged village officials were retaliating for a prior successful suit they had brought against the village.[46] This is a case where the justices wrote only a five paragraph opinion. The majority held that the Olechs' complaint alleged a proper equal protection claim under the rational basis test, the lowest level of judicial scrutiny.[47] Furthermore, the

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[41] *Id.*

[42] *Id.*

[43] *Id.* After a three month period, the village finally agreed to provide the water source with only a fifteen foot easement. *Id.*

[44] *Village of Willowbrook,* 528 U.S. at 1074. Ms. Olech claimed that the village violated the Equal Protection clause of the Fourteenth Amendment, by demanding an additional eighteen foot easement. *Id.*

[45] *Id.*

[46] *Id.* at 1074. Although the previous suit pertained to a completely unrelated matter, the Olechs asserted that the Village's actions were motivated by "ill-will" resulting from their previous successful lawsuit against the village. *Id.*

[47] *Id.* On appeal, the Court recognized Ms. Olech's claim as a successful equal protection claim brought by a "class of one." In these types of cases, the plaintiff alleges, as did Ms. Olech, that he/she has been intentionally treated differently from others who were similarly situated, and that there was no

validity of the claim did not depend on the allegation of ill-will.[48] In other words, the allegation that the Olechs were arbitrarily and irrationally singled out by the village was enough to state a proper equal protection claim.[49]

As the first Touro professor speaking this morning, I say, "let's grade the decision." Plaintiffs' lawyers have to love this decision. No question about it, they have to give this decision an 'A'. The decision gets their equal protection "class of one" claims out of the pleading stage and into summary judgment--maybe even to discovery--or better yet, to trial. I'm thinking, big dollar signs leading to settlement. If the plaintiff can get past a motion to dismiss, chances are, it's time for defendant to start thinking settlement. The municipal attorneys, however, would give this decision an 'F'. That leaves the most important group: law school professors. I would give it either a 'D' or, maybe, an 'incomplete'. Why do I say incomplete? The decision leaves open the most important question: what does a plaintiff have to demonstrate in order to prevail on this type of claim? The only holding the Court made was that the complaint stated an equal protection claim. The Court could have at least told us what that standard is, especially since circuit courts are split on this issue.[50] The Second Circuit holds that, in order for an equal protection claim to get passed a motion to dismiss, a plaintiff has to show he was arbitrarily given disfavored treatment, compared to others who were similarly situated, based on "impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or the malicious or bad faith intent to injure."[51] However, other courts differ.[52]

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rational basis for the difference in treatment. These allegations, according to the Court, are enough to state a claim for relief under traditional equal protection analysis. *Id.*

[48] *Id.*

[49] *Id. But see* Justice Breyer's concurring opinion.

[50] *See* Rubinovitz v. Rogato, 60 F.3d 906 (1st Cir. 1989); Yerardi's Moody Street Restaurant & Lounge, Inc. v. Bd. of Selectmen of the Town of Randolph, 878 F.2d 16 (1st Cir. 1996); LeClair v. Saunders, 627 F.2d 606 (2nd Cir. 1980); Futernick v. Sumpter Township, 78 F.3d 1051 (6th Cir.), cert. denied, 519 U.S. 928 (1996).

[51] *See* LeClair, 627 F.2d at 610-11.

[52] *See, e.g., Futernick*, 78 F.3d 1051, *supra* note 50.

The second question is: what is the role of governmental motivation when an equal protection claim is asserted under the rational basis test? The justices raised the issue in the oral argument in *Olech*,[53] but they ignored it in deciding the case, probably because they didn't know what to do with it. This is an issue on which the Court has sent out mixed signals. On the one hand, in equal protection cases under the rational basis test, the Court has made it clear that it is not concerned with the actual governmental interest or purpose for the particular legislation. It seems that any conceivably legitimate governmental interest will do.[54] On the other hand, in *Romer v. Evans*[55] and *United States Department of Agriculture v. Marino*,[56] the Supreme Court stated, "[i]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."[57] Well, what about the motive issue in *Olech*? Is a governmental desire to hurt a politically unpopular person a legitimate governmental interest? Shouldn't the court have answered this question? I think so, and this is why I would give this decision an incomplete.

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[53] *See* 68 U.S.L.W. 4157 (U.S. Feb. 23, 2000).

[54] *See, e.g.*, United States Railroad Retirement Board v. Fritz, 449 U.S. 166 (1980).

[55] 116 S. Ct. 1620 (1996).

[56] 413 U.S. 528 (1973).

[57] *Romer*, 116 S. Ct. at 1628 (citing *Moreno*, 413 U.S. at 534).